Supreme Court, U.S.
FILED
AUG 25 1989

No. 88-2069

In the Supreme Court of the United States

OCTOBER TERM, 1989

CLIFFORD TREKAS, PETITIONER

v.

LOUIS W. SULLIVAN,
SECRETARY OF HEALTH AND HUMAN SERVICES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

KENNETH W. STARR
Solicitor General
STUART E. SCHIFFER
Assistant Attorney General
ANTHONY J. STEINMEYER
SUSAN SLEATER
Attorneys
Department of Justice
Washington, D.C. 20530
(202) 633-2217

MICHAEL J. ASTRUE
General Counsel
DONALD A. GONYA
Chief Counsel for Social Security
ROBERT CROWE
LAWRENCE M. MEISTER
Attorneys
Department of Health and Human Services
Washington, D.C. 20314

QUESTION PRESENTED

Whether the district court abused its discretion in refusing to enjoin the Secretary of Health and Human Services from failing to withhold part of the benefits due social security claimants for payment directly to their attorneys, or to hold the Secretary in contempt, when petitioner's attorney had received direct payment of the maximum allowable amount.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a) and the orders of the district court (Pet. App. 2a-6a; App., *infra*, 1a-3a) are not yet reported.[1]

JURISDICTION

The decision of the court of appeals was entered on May 12, 1989. A petition for rehearing was denied on June 9,

[1] The district court order of June 14, 1988, as reproduced in the Appendix to the petition contains an apparent typographical error, substituting "not" for "now" in the second sentence on page 5a. As the context indicates, the district court actually wrote: "Plaintiff's attorney has now been certified a payment of $2,104.15, the maximum amount available for payment." That statement is consistent with the district court's earlier factual explanation (correctly reproduced at Pet. App. 3a-4a). The petition itself states that counsel was in fact paid $2,104.75 directly by the Secretary in May 1988 (Pet. 4).

1989 (Pet. App. 7a). The petition for a writ of certiorari was filed on June 19, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

Title 42, Section 406(b)(1) provides in relevant part:

> Whenever a court renders a judgment favorable to a claimant under this subchapter who was represented before the court by an attorney, the court may determine and allow as part of its judgment a reasonable fee for such representation, not in excess of 25 percent of the total of the past-due benefits to which the claimant is entitled by reason of such judgment, and the Secretary may * * * certify the amount of such fee for payment to such attorney out of, and not in addition to, the amount of such past-due benefits. In case of any such judgment, no other fee may be payable or certified for payment for such representation except as provided in this paragraph.

STATEMENT

1. Petitioner Trekas sought judicial review of an August 3, 1983, decision of the Appeals Council of the Social Security Administration denying him disability benefits, and on April 25, 1984, the district court remanded the case to the agency for further consideration (April 25, 1984 Order at 2). After additional administrative proceedings, petitioner was awarded Social Security disability insurance benefits and Supplemental Security Income benefits under Titles II and XVI, respectively, of the Social Security Act, 42 U.S.C. 401-433, 1381 *et seq.*, in a decision of the Appeals Council on September 17, 1985. The award included $24,417 in past-due benefits. In accordance with 42 U.S.C. 406, 25 percent of that amount, $6,104, was re-

tained by the Secretary for payment of any award of attorney fees. Sept. 17, 1985 Appeals Council Decision; Gov't C.A. Br. 3.

Petitioner was represented both in the agency proceedings in 1983 and before the district court by attorney Anthony Bartels until Bartels was dismissed by petitioner on February 9, 1984 (App., *infra,* 2a). Thereafter, attorney James Stanley represented petitioner on the remand proceedings before the agency. After the Appeals Council award, attorney Stanley sought direct payment out of the accrued back benefits of an attorney fee for his work before the agency, in accordance with 42 U.S.C. 406(a).[2] In December 1985, the Secretary certified a payment to him of $5,000 out of the retained portion of claimant's accrued back benefits (Gov't C.A. Br. 3).[3]

In December 1986, 15 months after the award of disability benefits to petitioner, the agency paid petitioner the remaining $1,104 of his accrued benefits. Gov't C.A. Br. 3.

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[2] Section 406(a) provides in pertinent part that:

> Whenever the Secretary, in any claim before him for benefits under this subchapter, makes a determination favorable to the claimant, he shall, if the claimant was represented by an attorney in connection with such claim, fix * * * a reasonable fee to compensate such attorney for the services performed by him in connection with such claim. If as a result of such determination, such claimant is entitled to past-due benefits under this subchapter, the Secretary shall * * * certify for payment (out of such past due benefits) to such attorney an amount equal to whichever of the following is the smaller: (A) 25 per centum of the total amount of such past due benefits, (B) the amount of the attorney's fee so fixed, or (C) the amount agreed upon between the claimant and such attorney as the fee for such attorney's services. * * *

[3] When petitioner objected to the size of this award, the Secretary reduced it to $4,000, and in October 1986 directed Stanley to pay the $1,000 overpayment to petitioner. Gov't C.A. Br. 3.

Meanwhile, on January 20, 1986, attorney Bartels filed a request with the United States District Court for the Eastern District of Arkansas for an attorney fee for work done in the judicial proceedings leading to the remand in April 1984. Motion for Attorney Fees. On July 27, 1987, the court concluded that Bartels no longer represented petitioner after February 9, 1984, but awarded him a fee of $3,008.30 for judicial representation before that time. App., *infra,* 2a.[4] After noting that the agency, not the court, had the authority to award fees for work performed at the agency level, and that "the maximum [of the court awarded and the administrative fees may] not exceed twenty-five percent of the plaintiff's past due benefits" the court directed the Secretary to pay Bartels the sum awarded plus any sums awarded for representation before the agency, out of petitioner's accrued back benefits, or to award Bartels "twenty-five percent of the plaintiff's past due benefits, whichever sum is less." App., *infra,* 3a. On August 3, 1987, Bartels applied for fees for his representation of petitioner before the agency, and the agency concluded that Bartels was entitled to a fee of $800 for work performed at the administrative level. May 2, 1988 Charge Authorization Form.[5]

Because all of petitioner's accrued back benefits had been paid over to him some 7 months before the date of the district court's order awarding fees, the Secretary was unable to pay that award "out of" those benefits. Nevertheless, on May 18, 1988, the Secretary made payment directly to

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[4] The court declined to award fees under the Equal Access to Justice Act, 28 U.S.C. 2412(d)(1)(A) (Supp. V 1987), finding that the Secretary's decision to deny petitioner's claim for benefits had been substantially justified. App., *infra,* 3a.

[5] The administrative fee authorization was increased to $2,000 in August 1988, after Bartels protested the amount of the fee awarded and provided further justification for a larger fee. Letter from Burton Berkley to Anthony W. Bartels (Aug. 12, 1988).

Bartels of $2,104, the difference between the amount ultimately awarded attorney Stanley and 25 percent of plaintiff's back benefits.[6] Bartels was advised to collect the balance of his authorized fee from petitioner. Pet. App. 3a-4a.

On May 5, 1988, attorney Bartels moved in this case for an injunction to stop the Secretary from "inadvertently" releasing all past-due benefits to beneficiaries, and for an order holding the Secretary in contempt for not paying the entire fee directly to Bartels. The district court denied the motion for contempt, finding that the Secretary had paid $2,104 to Bartels and that this amount was the maximum amount available for payment (Pet. App. 5a; see note 1, *supra*). The district court also denied the motion for an injunction, finding that the Secretary had no policy of improperly releasing all past-due benefits to beneficiaries. The court of appeals adopted the reasoning of the district court and affirmed its order (Pet. App. 1a).

ARGUMENT

Petitioner asks this Court to review the refusal of the courts below either to enjoin the Secretary from failing to withhold future benefits due petitioner to pay attorney fees, or to hold the Secretary in contempt for failing to pay his former attorney his full fees by withholding future benefits from petitioner.

1. It is far from clear that there is a proper petitioning party in this case. Not only has the named petitioner, Trekas, long since directed Bartels, who filed the petition, to stop representing him (App., *infra*, 2a), but also Trekas's interests are antithetical to the position urged in

[6] The Secretary informs us that he subsequently waived recoupment of that sum from petitioner. See 42 U.S.C. 404(b).

the petition—that the Secretary should be directed to withhold future benefits due Trekas for payment directly to his former attorney, Bartels.[7] Indeed, if Trekas were to be represented in this case in this Court, he would undoubtedly appear as a respondent, not a petitioner. Attorney Bartels evidently recognizes that he is filing the petition on his own behalf, not in a representative capacity. See Pet. 1, 8-11. We are aware of no case that suggests that he is a proper party to proceedings in this Court, still less that he is entitled to petition this Court, in his former client's name, for review of issues resolved below in that client's favor. Cf. *Diamond* v. *Charles,* 476 U.S. 54, 69-71 (1986). Moreover, the propriety of his attempt to assert interests so clearly at odds with those of his former client might well be questioned. In any event, the issues he presents are so evidently without merit that no further review is appropriate in this case.

2. Bartels is entitled to no further direct payments from the Secretary for his representation of petitioner in this case. Pursuant to 42 U.S.C. 406(b)(1), a court can award, and the Secretary can pay over directly, no more than 25 percent of a claimant's past-due benefit for attorney fees for representation in court. This limitation is designed to assure that the claimant gets the bulk of the back benefit payment. S. Rep. No. 404, 89th Cong., 1st Sess. 122 (1965). It would be inconsistent with that statutory purpose to read the statute as permitting each of several attorneys of a single claimant to recover the full 25 percent award. Cf. *Guido* v. *Schweiker,* 775 F.2d 107, 108 (3d Cir. 1985). Nor do we read the petition as arguing that

[7] Since the Secretary has waived recoupment from petitioner of the amounts paid directly to Bartels (see note 6, *supra*), the Secretary's actions on the issues here in dispute are highly favorable to petitioner.

the statute should be so interpreted.[8] Accordingly, the maximum amount that the Secretary could pay directly to Bartels for his court representation was $2,104.15.[9] That amount was paid to him on May 18, 1988 (Pet. App. 3a-4a).

Awards for legal representation at the agency level are not limited to 25 percent of back benefits, although the same limitation on withholding of back benefits for direct payment applies (42 U.S.C. 406(a)). Thus, the Secretary here authorized an additional $2,000 fee to Bartels for such work, even though that meant that the total authorized attorney fees on this account exceeded 25 percent of past-due benefits. But, in light of the statutory limitation on withholding of benefits for direct payment, the Secretary directed Bartels to recover that additional amount from petitioner.[10]

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[8] The petition does appear to argue (Pet. 12) that the court order directed the Secretary to pay Bartels $3,068 ($3,008 attorney fees plus $60 costs). That contention overlooks the plain terms of the order, which recognizes the 25 percent limitation. App., *infra*, 3a.

[9] The Secretary might have concluded that there remained only $1,104 for direct payment to Bartels. Twenty-five percent of the back benefits here equaled $6,104. Attorney Stanley had promptly applied for and received direct payment of $5,000 of that. Because Stanley was later directed to repay $1,000 to petitioner Trekas, the Secretary concluded that $2,104 remained available for direct payment to Bartels. The Secretary could at least equally logically have concluded that since Stanley made the repayment to Trekas, not to the Secretary, there was only $1,104 of Trekas's back benefits remaining in the Secretary's possession for payment over to Bartels.

[10] The petition asserts (Pet. 2-3) that 20 C.F.R. 404.1720, 404.1730, and 404.501 require the Secretary to withhold and pay over these fees from back benefits or to pay the attorney and recoup the amount from current benefits. This reading would place the regulations in direct conflict with the statutory limitation in Section 406(a).

3. Bartels apparently bases his demand for sanctions against the Secretary largely on his claim that he has been inconvenienced by the delay in payment of his fee.[11] Petitioner Trekas was awarded disability benefits in September 1985, and in January 1986 Bartels filed his application for a fee for judicial work related to the April 1984 judicial remand. When the district court had still not acted on that application by December 1986, it was not unreasonable for the Secretary to conclude that fifteen months after the award of benefits, the balance of those benefits should finally be paid over to Trekas. At that time, Stanley's fees had been paid directly to him, Bartels had not applied to the Secretary for fees for his work at the agency level, nor had he received a court order directing payment to him of fees for his judicial representation. Although the statute contains no time limitation,[12] it is clearly unfair to disabled claimants for the Secretary to withhold indefinitely the back benefits due them in anticipation of the possible future award of attorney fees. In these circumstances, any

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[11] Petitioner fails to cite any legal error by either court below. Petitioner states he filed this petition "to direct the Court's attention to actions of the Secretary of Health and Human Services which greatly discourage attorneys from representing Social Security disability claimants" (Pet. 6). Even if his allegations were true, they would not be a valid reason for granting review on certiorari. Cf. Sup. Ct. R. 17.

[12] The Secretary's regulations do contain a time limit for agency fee requests. They provide (20 C.F.R. 404.1730(c)) for the mailing of a notice to the attorney if no fee request is received within 60 days of the award of benefits to the claimant; unless a request for attorney fees for work performed at the agency level is received within 20 days of the mailing of that notice or any extensions that may be granted, "the collection of any approved fee is a matter between the attorney and the claimant represented" (20 C.F.R. 1730(c)(2)(ii)). The notice was mailed to attorney Bartels on October 5, 1985; he did not file his request for fees with the agency until August 3, 1987. Attorney Fee Case—Past Due Benefit Summary.

inconvenience Bartels has suffered in this case must be weighed against the inequity of indefinitely withholding from the disabled beneficiary the compensation to which he has been determined to be entitled.[13]

4. In sum, the record amply supports the district court's findings that the Secretary does not have a policy of inadvertently releasing all past-due benefits to beneficiaries and does not intentionally contravene attorney fee orders in an attempt to hinder the collection of attorney fees (Pet. App. 5a). The court of appeals adopted those findings (Pet. App. 1a). There is no need for further review by this Court. *Tiffany Fine Arts, Inc.* v. *United States,* 469 U.S. 310, 317-318 n.5 (1985); *Graver Tank & Mfg. Co.* v. *Linde Air Products Co.,* 336 U.S. 271, 275 (1949).

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[13] The petition (at 9-10) refers to other cases in which the Secretary assertedly has erroneously paid out back benefits that should have been retained for the direct payment of attorney fees. Both courts below found that the Secretary has no practice of making such erroneous payments, and Bartels' bare assertion that the Secretary's behavior in other cases was inappropriate is entitled to little weight in disputing that concurrent factual finding.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General
STUART E. SCHIFFER
Assistant Attorney General
ANTHONY J. STEINMEYER
SUSAN SLEATER
Attorneys

MICHAEL J. ASTRUE
General Counsel
DONALD A. GONYA
Chief Counsel for Social Security
ROBERT CROWE
LAWRENCE M. MEISTER
Attorneys
Department of Health and Human Services

AUGUST 1989

APPENDIX

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

Case No. LR-C-82-619

CLIFFORD TREKAS, PLAINTIFF

VS.

OTIS R. BOWEN,
SECRETARY OF HEALTH AND HUMAN SERVICES, DEFENDANT

[Filed July 28, 1987]

ORDER

Currently pending before this Court is the Petition for Attorney's Fees submitted and filed by the plaintiff's attorney, Anthony Bartels. The maximum allowable fee is twenty-five percent of plaintiff's back pay. The Court, however, may not unquestioningly approve an award solely on the basis of a contingency fee contract. *Galbreath v. Bowen,* 799 F.2d 370 (8th Cir. 1986); 20 C.F.R. §§ 404.1725 and 404.1730.

In each case the Judge must assess the value of the lawyer's services to the client in the judicial proceedings. *MacDonald v. Weinberger,* 512 F.2d 144, 147 (9th Cir. 1975); *McKittrick v. Gardner,* 378 F.2d 872 (4th Cir. 1967). The attorney-client agreement is a consideration,

but the final fitting of the fee to the services remains the duty of the Court. *Fenix v. Finch,* 436 F.2d 831 (8th Cir. 1971); *Robinson v. Gardner,* 374 F.2d 949, 952 (4th Cir. 1967). *See also Blankenship v. Schweiker,* 676 F.2d 116 (4th Cir. 1982).

In this case the attorney has claimed 36 hours and 20 minutes for the representation provided at the District Court level. The plaintiff has objected to the attorney receiving any fee for his representation in this case and has submitted various documents in an effort to show that he had discharged Mr. Bartels during the pendency of this case. Among these documents is a letter from a Social Security Administration claims representative, Mrs. M. Patton, dated 2-29-84. This letter states that Mr. Bartels has agreed to forward the plaintiff's file to a different attorney. The letter is corroborated by Mr. Bartels' time records which show that he charged plaintiff for a 20 minute phone call from Mrs. Patton on 2-9-84.

Because it appears that any work performed by Mr. Bartels after 2-9-84, was done without the consent of the plaintiff, the Court finds that it may not grant attorney's fees for such representation. The Court finds, however, that the 30 hours and 5 minutes charged for representation prior to that date were proper and fees must be granted accordingly. In light of counsel's experience, reputation, and ability, and in light of the contingency nature of this lawsuit, the Court finds that $100.00 is a reasonable hourly rate.

The Court, being fully advised, does hereby find that Anthony Bartels is entitled to an attorney's fee in the amount of $3,008.30 for the time spent in representation before this Court, and costs of $60.00, pursuant to 42 U.S.C. § 406(b)(1). *See McDonald v. Weinberger, supra; Fenix v. Finch, supra;* 20 C.F.R. § 404.1728.

The Court further finds that the plaintiff is not entitled to recover his fee from the United States under the Equal Access to Justice Act (EAJA), 28 U.S.C.A. § 2412. While the Court determined that this case should be remanded for further development, the Secretary's decision was not without substantial justification. Thus, the EAJA does not apply.

The Court notes that it has no authority to award attorney's fees for representation of a claimant before the Secretary at the administrative level. That power has been granted exclusively to the Secretary by 42 U.S.C. § 406(a). *Fenix v. Finch, supra,* 436 F.2d at 838. Consequently, the plaintiff's attorney must petition the Secretary for any fees requested in relation to representation at the administrative level. The Secretary will then coordinate any fees granted for such representation with the amount granted by the Court so that the maximum allowed fee will not exceed twenty-five percent of the plaintiff's past due benefits.

THEREFORE, it is Ordered and Decreed that an attorney's fee and costs in the amount of $3,068.30 from the past due benefits due the plaintiff herein, are hereby allowed to Anthony Bartels, the plaintiff's attorney, pursuant to 42 U.S.C. § 406(b)(1). The defendant is hereby ordered to compute, certify and pay said attorney this sum, in addition to any fees found to be due for representation at the administrative level, or twenty-five percent of the plaintiff's past due benefits, whichever sum is less.

It is further Ordered that the petition filed by plaintiff's attorney for attorney's fees pursuant to the EAJA should be, and is hereby, denied.

IT IS SO ORDERED this 27th day of July, 1987.

/s/ GARNETT THOMAS EISELE

Garnett Thomas Eisele
United States District Judge

U.S. GOVERNMENT PRINTING OFFICE 1989 – 241 699 00400